

**2007-08**  
**NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

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**A Dispute Arising Under**  
**The Statute of the International Court of Justice**

**March 2008**

**THE GOVERNMENT OF**  
**THE UNITED STATES**  
**(Applicant)**

**v.**

**THE GOVERNMENT OF**  
**CANADA**  
**(Respondent)**

**MEMORIAL OF THE RESPONDENT**

**TEAM # 2008-08R**

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## STATEMENT OF FACTS

Prior to the implementation of the Western Hemisphere Travel Initiative (WHTI), Canadian and American citizens have been able to freely cross their shared border with just a birth certificate and valid photo identification. (Compromis 1). But that all changed in April 2005, when the United States Department of State (DOS) and the United States Department of Homeland Security (DHS) unilaterally proposed the WHTI. (Compromis 1). The WHTI requires all travelers, both Canadian and American, to carry additional identification such as a valid passport or other appropriate secure documentation when travelling to the United States (U.S.) from within the Western Hemisphere (Compromis 1). The proposed final phase of WHTI will further require U.S. citizens and non-resident aliens alike, including Canada, to possess and provide at the time of entry into the U.S. a valid passport or other prescribed identification. (Compromis 1).

Canada takes the view that the WHTI will reduce travel of American citizens to Canada because only 40% of American citizens have valid passports. (Compromis 1). Reduced travel of American citizens will have a negative effect on the tourism industry in border cities as well as other popular tourist destinations in Canada. (Compromis 1, 2). Canada has raised issues with the U.S. government that the WHTI disproportionately affects Canada given the extent to which the free movement of persons limits the free movement of goods and services. (Compromis 1, 2).

In addition to the unilateral implementation of WHTI, on August 25, 2006, the U.S. announced another unilateral measure which imposes agricultural quarantine and inspection (AQI) user fees pursuant to the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA). (Compromis 2). This rule imposes AQI on all commercial shipments entering the United States from Canada beginning on November 24,

2006. (Compromis 2). Until currently, Canada had been exempted from the user fees and the effect of this unilateral announcement is the removal of this exemption. (Compromis 2). Beginning in 2007, the APHIS user fees were applied to all incoming parties, regardless of whether they are traveling with imported products. (Compromis 2). Additionally, APHIS removed the inspection exemption and implemented an inspection fee for all commercial ships entering the United States from Canada. (Compromis 2).

Canada's Department of Foreign Affairs and International Trade (DFAIT) communicated with its counterparts at DHS and the United States Trade Representative and expressed its opinion that the APHIS fees are customs fees and contrary to NAFTA and GATT. (Compromis 2). On August 21, 2007, Canada's Prime Minister Harper, U.S. President Bush and Mexico's President Calderón issued a Joint Statement and stressed to their ministers to improve the "Smart and Secure Borders" (SSB). (Compromis 3). The SSB aims to enhance border security measures, specifically between the U.S. and Canada. (Compromis 3). Extensive pressure was placed upon Canada, during the Joint Sessions, including pressure to implement \$US1 billion dollars in additional security measures not previously requested or agreed to. (Compromis 4).

In the midst of the discussions, false statements were made by candidates, who were seeking the Republican and Democratic Party nominations, that terrorists had entered the U.S. through Canada. (Compromis 4). Canada fully denied this accusation. (Compromis 5). Still, Canada wants to do its part to ensure that the U.S., its largest trading partner, is satisfied with the increased measures. (Compromis 5). To cover the cost for additional security measures and "thick borders" between the U.S. and Canada, Canada's Prime Minister announced a Fuel Export Charge on fuel transported by way of pipeline equal to \$CDN 25/barrel. (Compromis 5). The charge is imposed because Canada is very committed in doing its part to secure North American

borders, and it is only fair to have those that are receiving the benefit of the increased border security to pay for it. (Compromis 5). The tax is being charged directly to cover the costs associated with implementing the requested border measures by the U.S. (Compromis 5).

The U.S. has taken issue with the implementation of the Fuel Export Charge and, similarly, Canada has taken issue with the increased pressure placed upon Canadian citizens, tourism, and taxpayers. (Compromis 5). Canada references the *Softwood Lumber Product Export Charge, 2006* as a model precedent which allows the implementation of such charge. (Compromis 5). Canada filed a dispute with the ICJ with respect to the WHTI additional requirements that all Canadian and American citizens, over 18, be required to provide additional forms of photo identification. (Compromis 6). Canada has also taken issue with the increased inspections and user fees applied to Canadian goods imported to the U.S. (Compromis 6).

All of the parties have submitted declarations accepting, without reservation, the compulsory jurisdiction of this Court.(Compromis 6). All parties have also agreed that this Court would have jurisdiction to consider the issues presented by both the United States and Canada . (Compromis 6). Mexico has been notified by the United States and Canada to lift the dispute out of the NAFTA context and has not filed an objection to its loss of right to appear. (Compromis 6).

## QUESTIONS PRESENTED

The Government of Canada refers six questions to this Court:

1. Whether the WHTI is contrary to NAFTA Chapters 12 and 16 or GATS;
2. Whether the WHTI is not justified pursuant to the national security exception or a general exception in NAFTA, GATT, or GATS;
3. Whether the APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII;
4. Whether the APHIS user fees are not justified pursuant to the national security exception or a general exception in NAFTA, GATT, or GATS;
5. Whether the Fuel Export Charge is not contrary to NAFTA Articles 314, 315, 604 and 605 or GATT Articles I, VIII and XI;
6. Whether the Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102 or GATT Articles XX and XXI.

## **JURISDICTIONAL STATEMENT**

The Parties to this dispute, the United States and Canada, come before this Honourable Court, pursuant to Article 36(2) of Statute of the International Court of Justice.<sup>1</sup> The Parties each agree to bring its actions and positions in conformity with the legal conclusions of this Court with respect to the questions presented.

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<sup>1</sup> *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 25 October 1945) Art. 36(2) [*ICJ Statute*].

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## **SUMMARY OF ARGUMENT**

The WHTI requires additional documentation to enter U.S. territory and, because it impedes trade, is contrary to NAFTA and GATS. Since only 40% of Americans possess passports, WHTI will decrease trade in services between the two countries, creating harmful effects to the Canadian economy. WHTI is a trade barrier and is not justified under GATS Article XIV(b) which allows the imposition of trade barriers for the protection of human, animal, and plant life. There exists no solid evidence that the requirement of producing a passport at the border will decrease terrorism. Similarly, WHTI is not justified for reasons of essential security interests under NAFTA Article 2102, because there is no existing national security crisis and passport requirements are not sufficiently connected to the elimination of terrorism.

APHIS employs more intensive searches along the Canadian-American border, which greatly restricts trade and thus violates both NAFTA and GATT. The U.S. faces no new SPS threats coming from Canada to necessitate the removal of the previous APHIS fee exemption. The removal of Canada's exemption from the APHIS fees is not justified under GATT Article XX(b) because they are not in furtherance of protecting human, animal, and plant lives. Likewise, the APHIS fees are not justified for essential security reasons because there is no nexus between taxing fruits and vegetables and decreased terrorism.

The Fuel Export Charge was enacted by Canada in response to the U.S. demand that Canada increase checkpoints along the Canadian/U.S. border. The Fuel Export Charge is a user fee, pursuant to GATT Article VIII, and was enacted to raise the \$US1 billion that Canada will be paying to fulfill the U.S. demands. Alternatively, pursuant to International Law Commission (ILC) Draft Article 47, the Fuel Export Charge is a countermeasure in response to the breaches of international law by the U.S. Furthermore, the Fuel Export Charge is qualified under GATT

Article XX(b) and national security exceptions because the revenue raised by the charge will be applied directly to strengthening the borders between U.S. and Canada which will help preserve human lives and decrease terrorist attacks on U.S. citizens.

## **ARGUMENT**

### **I. THE WHTI IS CONTRARY TO NAFTA CHAPTERS 12 AND 16 OR GATS.**

WHTI is contrary to NAFTA and GATS because it is a discriminatory measure that impedes free trade between the U.S. and Canada and is therefore a disguised trade barrier. Both NAFTA and GATS are agreements based on principles of free trade. The applicable chapters of NAFTA are Chapter 12 and 16, which direct member states to encourage free flow of trade in services and business people.<sup>2</sup> GATS is an entire agreement addressing the importance of trading services and encouraging the free flow and liberalization of services.<sup>3</sup>

The U.S. proposal and partial implementation of the WHTI directly violates NAFTA Chapter 12 and 16 or GATS because it obstructs the flow of people crossing the Canadian-American border. The WHTI was originally proposed in April 2005, with the first phase implemented January 23, 2007, which effected travelers arriving by air.<sup>4</sup> Even prior to the implementation of phase one, Canada experienced negative consequences including reduced travel, reduced commerce, and deferred investments.<sup>5</sup> Furthermore, a study has predicted that

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<sup>2</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289, at chp. 12, 16 (entered into force 1 January 1994) [NAFTA].

<sup>3</sup> *General Agreement on Trade in Services*, 15 April 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (entered into force 1 January 1995) chapeau [GATS].

<sup>4</sup> U.S., Congress, *Card Format Passport; Changes to Passport Fee Schedule Federal Register*, 72 Fed. Reg. 249, 74169 (Washington, D.C.: United States Government Printing Office, Dec. 31, 2007).

<sup>5</sup> U.S., Interim Report of the Standing Senate Committee on Banking, Trade and Commerce, *Passports and PASS Cards, Identity and Citizenship: Implementing the WHTI* (Washington, D.C. 2006) at 2. [Interim Report of the Standing Committee].

<sup>5</sup> GATS, *supra* note 3 at Art.XIV(b).

Canada, as a result of WHTI, is expected to lose 14.1 million persons traveling to Canada for a total of \$CDN 3.6 billion during the span of 2005-2010.<sup>6</sup> This study only considers the tourism industry, inferring that the impact of the WHTI on Canada as a whole is potentially much larger and may create an even greater negative impact on trade in services.

Even though the U.S. has been working with the Canadian government to increase the accepted forms of documentation under the WHTI,<sup>7</sup> it is skeptical if additional forms will decrease the negative effect on Canada.<sup>8</sup> Therefore, to maintain the current level of trade in services between the U.S. and Canada and to fully comply with NAFTA and GATS, standards of documentation should not be altered.

## **II. THE WHTI IS NOT JUSTIFIED PURSUANT TO A NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.**

The WHTI as proposed and partially implemented violates the international law of GATS and NAFTA and is not justified under an exception to the agreements as claimed by the U.S.

### **A. The WHTI is Not Justified Pursuant to the General Exception of GATS Article XIV(b).**

The U.S. claims that even if the WHTI is found to be contrary to GATS, it is still in accordance with the agreement because it qualifies under the general exception of GATS Article XIV(b). This exception allows for measures that are “necessary to protect human, animal or plant life or health.”<sup>9</sup> GATS Article XIV has been interpreted in accordance with GATT Article XX, involving a two-tier analysis to determine whether a measure is necessary and whether it

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<sup>6</sup> *Interim Report of the Standing Committee, supra* note 5 at 2-3.

<sup>7</sup> U.S., Staff of Homeland Security Committee, Subcomm. On Border, Maritime and Global Counterterrorism, 110<sup>th</sup> Cong., *Observations on Implementing the Western Hemisphere Travel Initiative*, Committee Print (GAO-08-274R 2007) at 5.

<sup>8</sup> *Interim Report of the Standing Committee, supra* note 5 at 4.

<sup>9</sup> *GATS, supra* note 3 at Art.XIV(b).

supports the chapeau of Article XIV.<sup>10</sup> Necessity is defined as having a nexus between the intent and means of achieving the purpose and the absence of reasonable alternatives.<sup>11</sup>

The WHTI is not necessary because it lacks a sufficient nexus between the means and the ends and there are alternatives to be explored. The U.S. claims the purpose of the WHTI is to increase border security.<sup>12</sup> Canada agrees that security is imperative, however, there is no connection between showing a passport and protecting human lives. A passport confirms identity and nationality, but it does not identify the bearer of the passport as a low security risk. Other documentation options such as NEXUS and FAST, do in fact identify the holder as a low risk and also expedite the movement of services across the border.<sup>13</sup>

Next, the WHTI does not satisfy the chapeau of Article XIV because the WHTI is arbitrarily or unjustifiably discriminatory against Canada.<sup>14</sup> The U.S. acted unilaterally and at its own discretion when proposing and implementing the WHTI. This is evidenced by the consistent objections by the Canadian government, Canadian citizens, and even U.S. citizens. Furthermore, there is no evidence of a potential terrorist threat coming from Canada, thus proving these claims are unfounded. Therefore, WHTI presents both arbitrary and unjustifiable discrimination. The WHTI does not sufficiently present a means to increased security and the U.S. should explore further options that promote security and facilitate the movement of services across the border without discrimination against Canada.

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<sup>10</sup> WTO, *Report of the Appellate Body, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (2005) at ¶ 292, online: WTO <<http://docsonline.wto.org>>.

<sup>11</sup> *Ibid.* at ¶ 307.

<sup>12</sup> DHS Press Office, “*Fact Sheet: Strengthening Border Security and Facilitating Entry into the United States Moving Toward WHTI Implementation for Cross-Border Travel by Land and Sea*,” (20 July 2007), online: Homeland Security <[http://www.dhs.gov/xnews/releases/pr\\_1182351923729.shtm](http://www.dhs.gov/xnews/releases/pr_1182351923729.shtm)>.

<sup>13</sup> *Interim Report of the Standing Committee*, *supra* note 8 at 5.

<sup>14</sup> *GATS*, *supra* note 3 at Art. XIV.

## **B. The WHTI is Not Justified Pursuant to the National Security Exception of NAFTA Article 2102.**

The U.S. claims that the WHTI is qualified under the national security exception of NAFTA Article 2102. However, the WHTI does not fulfill Article 2102 and allowing the U.S. to invoke this exception will greatly impede international trade law. NAFTA Article 2102 is interpreted through GATT Article XXI and is often times deemed as self-defining by the nation claiming the exception.<sup>15</sup> As recently evidenced in the situation involving the Helms-Burton Act, a nation cannot implement a measure under national security when it is really a foreign policy measure.<sup>16</sup> The U.S. does not currently have a national security emergency. The WHTI is a means of regulating international trade and commerce which makes it an instrument of foreign policy. Therefore, WHTI is a foreign policy measure disguised as a national security measure and therefore is not justified under to NAFTA Article 2102.

Furthermore, from a policy standpoint, the WHTI should not be justified pursuant to a national security exception because doing so would set a precedent to allow security to trump international trade law. Terrorism is an on-going, long-term project that requires legal compliance with international trade law.<sup>17</sup> Allowing the WHTI to fall under a national security exception makes it more difficult for member states to create permanent counter-terrorism measures. Terrorism is a serious issue; however, it should be addressed by means consistent with international trade law.<sup>18</sup> For instance, the Asian Pacific Economic Cooperation (APEC) is engaged in the fight against international terrorism as an organization in which its main objective

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<sup>15</sup> Wesley A. Cann, Jr., "Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism" (2001) 26 *Yale Journal Int'l Law* 413, at 432-433.

<sup>16</sup> *Ibid.* at 433.

<sup>17</sup> Jaemin Lee, "Juggling Counter-Terrorism and Trade, the APEC Way: APEC's Leadership in Devising Counter-Terrorism Measures in Compliance with International Trade Norms" (2006)

12 *U.C. Davis J. Int'l L. & Pol'y* 257 at 258-59.

<sup>18</sup> *Ibid.* at 263.

is to enhance economic growth by reducing tariffs and trade barriers.<sup>19</sup> Like NAFTA, APEC's goal is to promote free trade. APEC includes 21 participating economies<sup>20</sup> and if it can recognize the affects of terrorism on international trade and be proactive to reach a long-term solution, so to should NAFTA. By having counter-terrorism measures work with international trade law, instead of as an exception, international law will be able to better grow and solidify these principles.

In conclusion, the WHTI is contrary to NAFTA or GATS because it impedes the cross border movement of services. The WHTI does not qualify for a general or national security exception under NAFTA, GATS, or GATT.

### **III. THE APHIS USER FEES ARE CONTRARY TO NAFTA ARTICLES 310 AND GATT ARTICLES I AND VIII.**

The removal of the APHIS user fee exemption violates numerous NAFTA and GATT provisions because the fees inhibit the original purpose behind these agreements: free trade.

To begin, Canada asserts that the APHIS user fees violate Article 310 of NAFTA, which states that there can be no customs or fees on products originating in NAFTA countries.<sup>21</sup> The GATT articles pertinent to this issue are I and VIII. GATT Article I is the Most-Favored-Nation (MFN) clause which demands equal treatment for all GATT parties.<sup>22</sup> GATT Article VIII deals with user fees which allow trade restrictions to be implemented for cost-reimbursement goals, as long as they are limited to the approximate expended costs and are not discriminatory in nature.<sup>23</sup>

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<sup>19</sup> U.S., Office of the Ambassador-at-Large for Counter Terrorism and Chairman, APEC Counter-Terrorism Task Force, *APEC Counter-Terrorism Review 2001-2006* (Pasay City, Philippines 2006) at 11.

<sup>20</sup> *What is Asia-Pacific Economic Cooperation? About APEC* (2007) online: Asia -Pacific Economic Cooperation <[http://www.apec.org/content/apec/about\\_apec.html](http://www.apec.org/content/apec/about_apec.html)>.

<sup>21</sup> *NAFTA*, *supra* note 2 at Art. 310.

<sup>22</sup> *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27, at Art. I (entered into force 1 January 1948) [*GATT 1947*].

<sup>23</sup> *Ibid.* at Art. VIII.

It is pertinent to first ascertain whether the APHIS fees are taxes or user fees because taxes are prohibited by NAFTA and GATT while user fees are permitted.<sup>24</sup> The Court of International Trade (CIT) analyzed the difference between taxes and user fees in *United States Shoe Corp. v. United States*<sup>25</sup> and determined that a user fee is primarily aimed at regulation while a tax is aimed at raising general revenue.<sup>26</sup>

Applying these rules to the case at hand, the U.S. has not qualified these APHIS charges as “user fees,” pursuant to GATT Article VIII. The U.S. argues that these “user fees” are in place to raise revenue to pay for Customs and Border Protection (CBP) measures.<sup>27</sup> However, there have been no cost assessments or specified trade zones in need of additional funding; instead the U.S. has arbitrarily applied these charges across the board regardless of cargo or prior inspection status.<sup>28</sup> The APHIS fees are not in furtherance of any specific goal and are used solely as trade impediments to protect the U.S. economy from competition. In essence, the U.S. taxes every single transaction which takes place between U.S. and Canada, which is not the purpose of GATT Article VIII.

Since the APHIS user fees have been classified as taxes and not user fees, they are in direct violation with the language of NAFTA Article 310.<sup>29</sup> Article 310 stipulates that absolutely no customs fees are allowed on products for the pure reason that they originate in another country.<sup>30</sup> The U.S. has put customs fees on all products arriving by airplane, commercial vessel,

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<sup>24</sup> *Ibid.*

<sup>25</sup> *United States Shoe Company v. United States*, 907 F. Supp. 408 at 409 (C.I.T. 1995).

<sup>26</sup> Howard Schragin, “U.S. Shoe Corp. v. United States: A Victory for U.S.-Canada Maritime Trade” (1996) 19 *Fordham Int’l L.J.* 1764, 1813-14.

<sup>27</sup> U.S., Congress, *Agricultural Inspection and AQI User Fees Along the U.S./Canada Border*, 72 Fed. Reg. 165, 35092 (Washington, D.C.: United States Government Printing Office, Aug. 25, 2006) [*AQI User Fees*].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Schragin*, *supra* note 26 at 1814.

<sup>30</sup> *NAFTA*, *supra* note 2 at Art. 310.

rail car, or truck moving from Canada to the United States “irrespective of cargo.”<sup>31</sup> This is exactly what NAFTA Article 310 was trying to eliminate - across the board fees based on country of origin.<sup>32</sup> The U.S. is acting in direct contradiction with Article 310 as well as the very soul of these free-trade agreements.

As for GATT Article I, Applicant argues that Canada, prior to lifting the APHIS user fee exemption, was receiving above MFN treatment and that by lifting the exemption Canada was put on par with the remaining WTO countries. Strictly confined to the language of the provisions this argument may hold value. However, because these countries have a longstanding relationship based on cooperation and flexibility, the U.S. and Canada have never confined the terms of their relationship by the four corners of these agreements, as evidenced in the *Softwood Lumber Export Charge, 2006*.<sup>33</sup> For example, in 2006, the U.S. lumber industry was in trouble due to the state-subsidizing lumber being imported from Canada.<sup>34</sup> The U.S. enacted a duty against any Canadian lumber imported into the United States which violated NAFTA.<sup>35</sup> The outcome of this case was an outside agreement between the U.S. and Canada, which was conducive to the needs of the U.S.<sup>36</sup> In fact, Canada allowed \$450 million of the proceeds to go toward meritorious U.S. foundations, like low-income housing efforts.<sup>37</sup>

The SSB is another example of the accommodating and supportive relationship existent between these two nations. The U.S. wanted to enhance border security after the U.S. was

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<sup>31</sup> *AQI User Fees, supra* note 27.

<sup>32</sup> *NAFTA, supra* note 2 at Art. 310

<sup>33</sup> *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp.2d 1323 (Ct. Int’l Trade 2006).

<sup>34</sup> *Ibid.* at 1327.

<sup>35</sup> *Ibid.* at 1373.

<sup>36</sup> *Softwood Lumber*, online: Office of the United States Trade Representative <[http://www.ustr.gov/World\\_Regions/Americas/Canada/Softwood\\_Lumber/Section\\_Index.html](http://www.ustr.gov/World_Regions/Americas/Canada/Softwood_Lumber/Section_Index.html)?ht=>.

<sup>37</sup> *Ibid.*

attacked; however, Canada was not in any danger whatsoever. Canada balanced its trade interests with the pressure applied to increase border security by the U.S., its biggest trading partner. Canada allowed the U.S. to implement all of these measures even though they were incredibly trade-restrictive and in violation of numerous free trade agreements. *The Softwood Lumber Dispute* and the SSB are just two examples of past state practices that have textually violated the trade agreements but, nevertheless, were observed. All things considered, these past state practices have borne a new definition of MFN.

As has been shown, the U.S. and Canada have never been strictly held to treaty language as they have developed a customary relationship based on trust and cooperation, thus redefining the MFN term. Accordingly, the U.S. has violated the MFN requirement by lifting the APHIS fee exemption.

#### **IV. THE APHIS USER FEES ARE NOT JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA, GATT, OR GATS.**

The U.S. claims that the removal of the APHIS exemption is justified because it is in furtherance of protecting human, animal, and plant life or for reasons of national security interests. As will be further discussed, these arguments are unfounded and do not justify the actions taken by the U.S.

##### **A. The APHIS Fees Are Not Justified Pursuant to the General Exceptions Set Forth in NAFTA, GATT, or GATS.**

The removal of Canada's APHIS exemption is not justified by the general exceptions found in NAFTA, GATT, or GATS because they are not aimed at protecting human lives.

The applicable provisions, which embody the general exceptions, are NAFTA Article 2101, GATS Article XIV, and GATT Article XX. The controlling provision here is GATT Article XX because the corresponding articles in NAFTA and GATS, which deals with trade in

services, simply invoke the language of this article.<sup>38</sup> GATT Article XX(b) states that a country is allowed to take necessary measures in order to protect human, animal, or plant life or health.<sup>39</sup>

GATT includes an agreement regarding SPS concerns.<sup>40</sup> Since the APHIS fees deal with Sanitary and Phytosanitary (SPS) measures it is subject to the SPS Agreement.<sup>41</sup> The general rule is that SPS measures which conform to the SPS Agreement are presumed to comply with the general exception under GATT Article XX(b).<sup>42</sup> This agreement justifies trade barriers as long as they are in pursuance of (a) preserving the life or health of humans, plants, or animals; (b) based on scientific evidence; (c) based on a risk assessment which balances scientific principles against relevant economic factors; (d) not arbitrary or unjustifiable so as to constitute a disguised trade barrier; and (e) not more trade restrictive than necessary.<sup>43</sup>

Applying these elements to the APHIS taxes, it is clear that the U.S. is attempting to create another trade barrier under the cloak of an SPS measure. First, there are no newly emerging threats to animal, plant, or human life originating from Canada that necessitates additional SPS protection. Additionally, before the SPS measures were implemented there was no risk assessment conducted to decide on the best course of action. The U.S. conducted a few “blitzes” which it claims turned up various pests.<sup>44</sup> However, the U.S. has not designated the quantity of pests which were recovered nor did it assert any specific risks these pests pose.

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<sup>38</sup> *GATT 1947*, *supra* note 22 at Art. XX(b).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 December 1993, GATT Doc. MTN/FA Ii-A1A-4, 33 ILM XXX (entered into force 1 January 1995) [*SPS Agreement*].

<sup>41</sup> Heather D. Heavin, “The Biosafety Protocol and the SPS Agreement: Conflicts and Dispute Resolution” (2003) 12 J. Env. L. & Prac. 373, 381-82.

<sup>42</sup> *Ibid.* at 383.

<sup>43</sup> *Ibid.* at 386.

<sup>44</sup> Agricultural Inspection and AQI User Fees Along the U.S./Canada Border, *Preliminary Economic Analysis for Agricultural Inspection and AQI User Fees Along the U.S./Canada Border*, (10 August 2006), at 5, online: Regulations.Gov <http://www.regulations.gov/>

In application of the remaining elements, it is clear that these fees are incredibly arbitrary as they apply to anything and everything crossing the border regardless of the type of cargo or whether they have been previously inspected.<sup>45</sup> Furthermore, because these fees are so broadly applied, it is definitely not the most trade-restrictive mode of enhancing inspection at the borders. The U.S. could have made the fees less trade-restrictive if it had conducted scientific studies and pinpointed specific zones or matters that imposed significant risks and then taken action accordingly. This practice would be much less trade-restrictive as it would only tax the potentially harmful products and not all Canadian exports.

Applicant will argue that the APHIS fees are valid pursuant to the precautionary principle, which allows trade barriers to be implemented even in the instance of scientific uncertainty.<sup>46</sup> This rule allows precautions to be taken in the face of “serious or irreversible danger” however it is subject to some limitations.<sup>47</sup> For example, “[b]efore the precautionary principle is invoked, scientific research is often necessary to identify the potentially negative effects of an activity and to assess the probability that those effects will occur.”<sup>48</sup> As can be seen by the facts, the U.S. has asserted no specific pest, disease, or otherwise originating in Canada of which it feels threatened. The U.S. bases its fears on unsubstantiated inferences drawn from these sporadic and unreliable “blitzes.”

For these reasons, the removal of Canada’s APHIS exemption is not justified pursuant to any of the general exemptions set forth in GATT, NAFTA, or GATS and is merely a trade barrier disguised as protection of plant, animal, and human life or health.

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fdmspublic/component/main?main=DocumentDetail&o=09000064801be93e [*Preliminary Economic Analysis*].

<sup>45</sup> *AQI User Fees*, *supra* note 27.

<sup>46</sup> Markus W. Gehrig, “Precaution, Health, and the World Trade Organization: Moving Toward Sustainable Development” (2003) 29 *Queens L. J.* 133, 135.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 136.

**B. The APHIS Fees Are Not Justified Under NAFTA or GATT National Security Exceptions.**

Applicant claims that the removal of the APHIS exemption is justified because it promotes national security. However, there are no existent SPS issues that threaten the security of the U.S. The U.S. is hiding behind the façade of a national security exception to rationalize all of the trade impediments which it has imposed.

The applicable rules are found in NAFTA Article 2102, GATT Article XXI, and GATS Article XIV. Again GATT Article XXI is the controlling provision as NAFTA invokes GATT XXI as well as GATS.<sup>49</sup> Accordingly, GATT XXI(b) reads “nothing in this agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.”<sup>50</sup> As a general rule, the majority of states assert that GATT Article XXI can be applied as a trade restriction when there exists a “bona fide nexus between the alleged security interest and the trade restriction being imposed.”<sup>51</sup>

The U.S. cannot invoke the essential security exception to justify the APHIS taxes because they have absolutely no bona fide connection to national security interests of the U.S. The argument that pests pose a threat of harm to the general well-being of all American citizens is ludicrous. Aside from the blitzes, the U.S. has no further evidence indicating the existence of any SPS issues that threaten the security of the U.S., which would permit actions in violation of NAFTA and GATT. Furthermore, there is no ongoing war, armed conflict, or international emergency which is generally required to necessitate immediate relief pursuant to this exception.

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<sup>49</sup> *GATT 1947*, *supra* note 22 at Art. XXI.

<sup>50</sup> *Ibid.* at Art. XXI(b).

<sup>51</sup> *Cann, Jr.*, *supra* note 15 at 432-433.

Overall, there is no substantial threat to the essential securities of the U.S. Additionally, there is no nexus between the national security interest and the trade barrier imposed.

**V. THE FUEL EXPORT CHARGE IS NOT CONTRARY TO NAFTA ARTICLES 314, 315, 604, AND 605 OR GATT ARTICLES I, VIII, AND XI.**

The Fuel Export Charge was enacted by Canada to raise the revenue needed to comply with the U.S. requests pursuant to SSB. Taxes and duties run contrary to the free trade spirit of NAFTA and GATT, but when enacted for cost-recovery purposes they are deemed as user fees, which are permitted under these agreements.<sup>52</sup> As will be further discussed, the Fuel Export Charge is a user fee, and conversely not a duty, which renders the remaining provisions inapplicable.

**A. The Fuel Export Charge is a User Fee And Thus Does Not Violate The Specified NAFTA or GATT Provisions Relating To Duties.**

The U.S. asserts that the Fuel Export Charge violates NAFTA Articles 314, 315, 604, 605, or GATT Articles I, VIII, and XI.<sup>53</sup> As previously discussed in *U.S. Shoe Company*, a charge is deemed a user fee if it is ultimately aimed at cost-reimbursement and the revenue is approximate equal to the costs expended.<sup>54</sup>

Applying the aforementioned rules to the current situation, it is apparent that the Fuel Export Charge is a user fee and not a tax. The purpose behind enacting the Fuel Export Charge was to raise the necessary funds so that Canada could fully comply with the SSB directives.<sup>55</sup> The funds raised from the charge go towards the inspection and analysis of border checkpoints as requested by the U.S.

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<sup>52</sup> *GATT 1947*, *supra* note 22 at Art. VIII.

<sup>53</sup> Compromis 5.

<sup>54</sup> *Schragin*, *supra* note 26.

<sup>55</sup> Compromis 5.

Next, although Applicant will assert otherwise, the Fuel Export Charge is not at all discriminatory towards the U.S. There are no other motives behind this charge, especially because the Canadian oil market is in no way threatened by competition from the U.S. In fact, “[a]lmost all of Canada’s energy exports go to the United States, making it the largest foreign source of U.S. energy imports: Canada is consistently among the top sources for U.S. oil imports, and it is the largest source of U.S. natural gas and electricity imports.”<sup>56</sup> These facts portray the fact that Canada is not trying to undercut the American energy industry for the purposes of domestic protectionism, mainly because Canada is not vulnerable to the American fuel economy.

Applicant argues that Canada is prevented from invoking GATT Article VIII because Canada has produced no dollar figure indicating how much the border security measures will cost. However, Applicant’s argument is misguided because Canada has pledged to do \$US1 billion worth of border enhancements pursuant to the Joint Statement issued after the Montebello Conference.<sup>57</sup> However, because the U.S. is the primary beneficiary of this agreement the U.S. should have to foot the bill. The U.S. desires enhanced border security, and Canada agreed to help based on the longstanding, cooperative, and flexible relationship between these two states. Again, Canada’s argument relies on the basic notions of justice: if the U.S. wants heightened border security then it should pay for the enhancements.

In sum, Canada is not threatened by the U.S. oil industry and thus the Fuel Export Charge was not enacted for domestic protection, but rather to raise revenue so Canada can meet its obligations under the SSB directives. Accordingly, the Fuel Export Charge is a user fee and is not violative of any of the remaining NAFTA or GATT Articles because they speak to taxes.

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<sup>56</sup> Alastair R. Lucas, “Canada’s Role in the United States’ Oil and Gas Supply Security: Oil Sands, Arctic Gas, NAFTA, and Canadian Kyoto Protocol Impacts” (2004) 25 Energy L.J. 403.

<sup>57</sup> Compromis 2.

**B. The Fuel Export Charge is a Countermeasure, Which is Permitted by Principles of International Law and Therefore is Not in Violation of GATT or NAFTA.**

There is a general principle of international law that allows a party to retaliate against another upon a breach of an international obligation.<sup>58</sup> By implementing the WHTI and APHIS measures, the U.S. breached various free trade agreements and Canada simply retaliated by implementation of the Fuel Export Charge. Therefore, the Fuel Export Charge is a countermeasure and is not in violation of the NAFTA or GATT provisions specified by the U.S.

When rendering decisions, this Honorable Court is not constrained to the language of NAFTA or GATT. Article 38 of the Statute of the ICJ expressly allows the court to look elsewhere for indications of current or emerging principles of international law.<sup>59</sup> This statute indicates that there are other principles of international law beyond treaties, such as conventions, international custom, general principles of law recognized by civilized states, and judicial decisions and the writings of learned professionals.<sup>60</sup> Additionally, “the [GATT] is not to be read in clinical isolation from public international law.”<sup>61</sup> Looking outside of the applicable treaty language, there is a general principle of retaliatory countermeasure embodied in International Law Commission (ILC) Draft Article 47.<sup>62</sup> This article allows a party to retaliate against another who breaches international law in order to induce compliance with their original agreement.<sup>63</sup> Additionally, ILC Draft Article 47 points out that the countermeasure must be fairly proportional to the harm caused by the original breach.<sup>64</sup>

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<sup>58</sup> UN GAOR, 56th Sess., UN Doc. A/56/10 (2001) Supp. No. 10, at 43. [*ILC Draft Articles*].

<sup>59</sup> *ICJ Statute*, *supra* note 1 at Stat. 38.

<sup>60</sup> *Ibid.*.

<sup>61</sup> Steve Charnovitz, “Rethinking WTO Trade Sanctions” (2001) 95 Am. J. Int’l L. 792, 793.

<sup>62</sup> *ILC Draft Articles*, *supra* note 56 at Art. 47.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at Art. 49.

When used in conjunction with GATT, whose “organizing principle is a system of reciprocal rights and obligations to be maintained in balance,”<sup>65</sup> it is evident that there are existing principles allowing a country to violate treaty provisions in response to another party’s breach. The general principle of retaliation was invoked by Canada after the U.S. violated NAFTA and GATT through implementation of the APHIS and WHTI. GATT and NAFTA were enacted, with one concept in mind: free trade. In one foul swoop, the U.S. broke the spirit of both agreements by implementing WHTI, which requires proof of identification in order to cross the border, and APHIS, which requires fees and extensive inspections regardless of the cargo. Free trade is considerably disrupted by these new requirements and no doubt has a negative impact upon cross-border trade. The U.S. breached its obligation to encourage the free flow of people and goods across the Canadian-American border and since that breach has taken a financial toll on Canadian travelers, it is only fair that the U.S. is subjected to the same treatment.

Additionally, the countermeasure taken by Canada is not excessive in comparison to the original breach by the U.S. The U.S. greatly hindered the trade and transportation industry of Canada by implementing WHTI and APHIS. In response, Canada chose to charge the user fee to fuel exports, because that is its largest export to the U.S. and most likely the best avenue to force U.S. compliance with the notion of free trade set forth in NAFTA and GATT.<sup>66</sup> Moreover, placing a fee on oil will hinder the trade and transportation industry of the U.S. as WHTI and APHIS hindered the Canadian economy.

Overall, Canada’s actions were merely retaliatory and they were in compliance with the regulations set forth in ILC Draft Article 47. As such, the Fuel Export Charge is not violative of NAFTA or GATT.

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<sup>65</sup> *Charnovitz, supra* note 61 at 802.

<sup>66</sup> *Compromis* 5.

**VI. THE FUEL EXPORT CHARGE IS JUSTIFIED PURSUANT TO THE NATIONAL SECURITY EXCEPTION OR A GENERAL EXCEPTION IN NAFTA ARTICLE 607, 2101, 2102, OR GATT ARTICLES XX AND XXI.**

Should this Honorable Court find that the Fuel Export Charge is not a user fee or a countermeasure, Canada's actions are justifiable through one of the many exceptions set forth in NAFTA and GATT .

**A. The Fuel Export Charge is Justified Pursuant To General Exceptions Set Forth in GATT Article XX and NAFTA Article 2101.**

One of the most cherished general exceptions set forth in both NAFTA and GATT addresses the concern of preservation of plant, animal, and human life or health.<sup>67</sup> This concern for human life was the ultimate-goal behind the Fuel Export Charge: the money was being raised to build the SSB infrastructure for the protection of innocent American civilians from future terrorist attacks.

NAFTA and GATT both embody general exceptions which render the Canadian government's actions justifiable. GATT Article XX allows the imposition of trade barriers which are necessary for the protection of human, animal, and plant, life or health as long as they are not arbitrary or unjustifiably discriminatory.<sup>68</sup> Similarly, the text of NAFTA Article 2101 invokes the language contained in GATT Article XX.<sup>69</sup>

It is necessary to further analyze all elements of the relevant statutes to gain a full understanding of the exception. First of all, both statutes contain a requirement that the measure must be "necessary" to protect the life or health of plants, animals, or humans.<sup>70</sup> Relative to these provisions, "necessary" means that the regulation must not be more trade restrictive than

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<sup>67</sup> *GATT 1947*, *supra* note 22 at Art. XX.

<sup>68</sup> *Ibid.* at Art XX(b).

<sup>69</sup> *NAFTA*, *supra* note 2 at Art. 2101

<sup>70</sup> See e.g. *GATT 1947*, *supra* note 22 at Art. XX(b).

needed in order to accomplish the desired goal.<sup>71</sup> Thus, if there is more one than one route to accomplish the goal of protecting human, animal, or plant life, the chosen route must be the one that least impedes free trade.<sup>72</sup>

Lastly, the regulations cannot be made as a means of arbitrary or unjustifiable discrimination. There is no paramount test to determine “arbitrariness,” but the standard is “generally one which assesses the good faith of the party invoking the exception.”<sup>73</sup> Essentially, as long as the regulation was enacted without discriminatory intent it will be deemed valid.<sup>74</sup>

Applying all of the aforementioned rules to the present scenario, Canada’s implementation of the Fuel Export Charge satisfies the criteria set forth in the applicable provisions. First and foremost, Canada’s actions were indeed necessary for the accomplishment of its end-goal of protecting human lives. Canada had to enact a charge on a product that would create enough revenue to pay for the \$US1 billion worth of border enhancements of which it promised.<sup>75</sup> Oil is one of Canada’s main export to the U.S., and the Fuel Export Charge is expected to generate the necessary revenue for the implementation of SSB.<sup>76</sup> Taxing any other product would have resulted in a less-than-adequate revenue insufficient to support the SSB directives.

More importantly, the Fuel Export Charge was not enacted in an arbitrary or discriminatory manner. On the contrary, the Fuel Export Charge is applied to every export of

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<sup>71</sup> John Barcelo, III., “Product Standards to Protect the Local Environment- The GATT and the Uruguay Round Sanitary and Phytosanitary Agreement” (1994) 27 Cornell Int’l L. J 755, 10.

<sup>72</sup> *Ibid.*

<sup>73</sup> Lee McIntosh, “An International Investment Agreement and the Environment” (1999) 9 J. Env. L. & prac. 119, 141.

<sup>74</sup> *Ibid.*

<sup>75</sup> Compromis 4.

<sup>76</sup> *Alastair, supra* note 56 at 405.

fuel going to the U.S., regardless of its destination. The charge is not discriminatorily aimed at one industry or one product, it is applied equally to all fuel exported to the U.S.

Overall, although this is a novel use of GATT XX(b) the elements have been satisfied regarding the Fuel Export Charge, thus justifying Canada's actions as they are in furtherance of protecting innocent lives from future terrorist attacks.

**B. The Fuel Export Charge is Justified For Essential Security Concerns under GATT XXI and NAFTA Articles 607 and 2102.**

When the safety and well-being of the U.S. or Canada is at risk, the goal of free trade is trumped by the obligation to protect the people and prosperity of each nation. Certain provisions in NAFTA and GATT provide exemptions for actions that would otherwise be prohibited when faced with issues involving security.<sup>77</sup> In the event that Canada is found to be in violation of NAFTA or GATT, its actions are justified under the essential security exceptions because Canada implemented the Fuel Export Charge to raise revenue for enhanced border security.

The applicable provisions are found in GATT Article XXI and NAFTA Articles 607 and 2102. NAFTA Article 2102 and 607 invoke the language GATT Article XXI, providing nothing shall stand in the way of a state from taking measures it deems necessary for the protections of its essential security interests.<sup>78</sup> The only distinction is that NAFTA Article 607 refers specifically to fuel and petrochemicals.<sup>79</sup> Also, as stipulated in the previous section, there must be an existing nexus between the trade measure imposed and the essential security interest being protected.<sup>80</sup>

Considering all of the aforementioned guidelines in reference to essential security interests, it is difficult to imagine how border security enhancements enacted for the purposes of

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<sup>77</sup> *GATT 1947*, *supra* note 22 at Art. XXI.

<sup>78</sup> *Ibid.*

<sup>79</sup> *NAFTA*, *supra* 2 at Art. 607.

<sup>80</sup> *Cann, Jr.*, *supra* note 15 at 432-433.

safeguarding against terrorism do not fall within the security exceptions. Furthermore, there is a direct link between the imposed trade measure, which is the Fuel Export Charge, and the end goal of protecting the U.S. from terrorism. The common thread in many terrorist attacks is the existence of fuel or transportation matters because they are necessities of a healthy economy.

Overall, it has been proven that there does exist a national security interest and the Fuel Export Charge was executed with those interests in mind, thus justifying Canada's actions under GATT Article XXI.

### **CONCLUSION**

THEREFORE, the Respondent respectfully requests that this Honorable Court adjudge and declare that:

- i) The WHTI is contrary to NAFTA Chapter 12 and 16 or GATS;
- ii) The WHTI is not justified pursuant to the national security exception or general exception in NAFTA, GATT, or GATS;
- iii) The APHIS user fees are contrary to NAFTA Article 310 and GATT Articles I and VIII;
- iv) The APHIS user fees are not justified pursuant to the national security exception or a general exception in NAFTA, GATT, or GATS;
- v) The Fuel Export Charge is not contrary to NAFTA Articles 314, 315, 604, and 605 or GATT Articles I, VIII, and XI;
- vi) The Fuel Export Charge is justified pursuant to the national security exception or a general exception in NAFTA Articles 607, 2101, 2102, or GATT Articles XX and XXI.